UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

BELLAGIO, LLC,

Employer,

and

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE TECHNICIANS ARTISTS AND ALLIED CRAFTS OF THE UNITED STATES AND CANADA LOCAL 720, AFL-CIO, Case No. 28-RC-088794

Union.

MOTION TO AMEND BELLAGIO, LLC'S EXCEPTIONS TO HEARING OFFICER'S REPORT AND RECOMMENDATIONS ON OBJECTIONS TO CONDUCT AFFECTING RESULTS OF THE ELECTION

Pursuant to Rules and Regulations 102.65 and 102.69, Bellagio moves to amend the exceptions that were filed in this matter on November 2, 2012. Specifically, Bellagio respectfully requests that the Board consider two additional exceptions, both of which are based on the D.C. Circuit Court of Appeals' decision in *Noel Canning v. NLRB, et al.*, Nos. 12-1115 and 12-1153, slip op. (D.C. Cir. Jan. 25, 2013). *See also New Process Steel, L.P.*, 130 S. Ct. 2635, 2636 (2010); *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009).

Noel Canning had not been decided at the time that Bellagio filed its exceptions. As such, Bellagio could not have included these exceptions when it petitioned the Board for review of the Hearing Officer's Report and Recommendations. Consideration of these exceptions does not require reopening the record. Moreover, because *Noel Canning* raises constitutional questions regarding the Board's current and past jurisdiction, as well as its authority to issue

earlier decisions on which the Hearing Officer and Regional Director relied, it is necessary that they be considered now. Finally, for these reasons, as well as the facts that the Board has not yet taken action and that International Alliance of Theatrical Stage Employees and Moving Picture Technicians Artists and Allied Crafts of the United States and Canada, Local 720 AFL-CIO (the "Union") has not been required to respond, no party will be prejudiced by these supplemental exceptions.

The two exceptions are included as Exception Nos. 28 and 29 in BELLAGIO, LLC'S AMENDED EXCEPTIONS TO HEARING OFFICER'S REPORT AND RECOMMENDATIONS ON OBJECTIONS TO CONDUCT AFFECTING RESULTS OF THE ELECTION, which is attached hereto as Exhibit 1. The facts and legal reasoning supporting each exception is included within the individual exception, so Bellagio's supporting brief need not be amended. *See* Section 102.69. For the Board's convenience, the full text of both exceptions is included here:

Exception No. 28: The results of the election cannot be certified, and the processing of the underlying petition was invalid, because the Board lacked a quorum at the times the petition was filed, the election was conducted, and the Region conducted a hearing and overruled Bellagio's objections to the elections. Under the Act, all authority is vested in the Board. Because the President's recess appointments of Members Becker, Block, Griffin and Flynn are constitutionally invalid, however, the Board lacked a quorum at all times relevant to this case. Noel Canning v. NLRB, et al., Nos. 12-1115 and 12-1153 (D.C. Cir. Jan. 25, 2013); see also New Process Steel, L.P., 130 S. Ct. 2635, 2636 (2010); Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB, 564 F.3d 469 (D.C. Cir. 2009). While others may act on the Board's behalf by statute or delegation, they cannot do so when the Board itself lacks the authority to act. Accordingly, the election must be set aside, its results cannot be certified, and the underlying petition for election must be dismissed. See id.; see also New Process Steel, 130 S. Ct. at 2636.

Exception No 29: Bellagio excepts to the Hearing Officer's application of *Mastec Direct TV*, 356 NLRB No. 110 (March 7, 2011). That decision is invalid pursuant to the D.C. Circuit's decision in *Noel Canning v. NLRB, et al.*, Nos. 12-1115 and 12-1153, slip op. (D.C. Cir. Jan. 25, 2013). *See also New Process Steel*,

L.P., 130 S. Ct. 2635, 2636 (2010); Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB, 564 F.3d 469 (D.C. Cir. 2009). Mastec was a split decision, with Chairman Liebman and Member Becker in the majority and Member Hayes In Noel Canning, however, the D.C. Circuit held that recess appointments to the Board are invalid under the Constitution's recess appointments clause when the underlying vacancy did not "happen" during the Senate's recess and the President's purported appointment did not occur during that same recess. Nos. 12-1115 and 12-1153, slip op. at 14, 40-44. Accordingly, because the appointment of Member Becker did not satisfy these conditions, it was invalid. He could not have participated in Mastec, and the Board could not have issued a decision, let alone overruled decades of established precedent regarding whether an individual can be considered an agent of a union and whether an election should be set aside based upon third party misconduct, in that case. It therefore could not have been used as an authority to overrule Bellagio's objections to the conduct of Union Business Agents J.T. Gorey, Robert Cohen, and Alfonso Torres. (Report at 9-20).

Finally, Bellagio believes that consideration of these exceptions, rather than the submission of a letter of supplemental authorities pursuant to *Etiwanda, LLC*, 339 NLRB 66 (2003), is the appropriate vehicle for bringing these matters to the Board's attention. Including them as individual exceptions will make briefing and discussion of the issues more convenient for all parties. If the Board does not accept the filing of these exceptions, it should still take notice of *Noel Canning* and the arguments contained herein pursuant to the procedure set forth in *Etiwanda, LLC*. To that end, a copy of this motion is also being sent to the Board's Executive Secretary, Lester Heltzer.¹

¹ A copy of the letter to Executive Secretary Heltzer is attached as Exhibit 2.

WHEREFORE, Bellagio respectfully requests the foregoing Motion to Amend Bellagio's

Exceptions be granted, the election be set aside, and a new election be ordered.

Dated: March 21, 2013

Respectfully submitted,

JACKSON LEWIS LLP

By: /s/ Paul T. Trimmer

Gary C. Moss Paul T. Trimmer 3800 Howard Hughes Parkway

Suite 600

Las Vegas, Nevada 89169 Telephone: (702) 921-2460 Facsimile: (702) 921-2461 Attorneys for Employer

CERTIFICATE OF SERVICE

Case Name: BELLAGIO, LLC, 28-RC-088794

I, Paul Trimmer, declare that I am employed with the law firm of Jackson Lewis LLP, whose address is 3800 Howard Hughes Pkwy, Suite 600, Las Vegas, NV 89169. I am over the age of eighteen (18) years and am not a party to this action. I declare under penalty of perjury under the laws of the State of Nevada that the following is true and correct.

On March 21, 2013, electronically filed the MOTION TO AMEND BELLAGIO, LLC'S EXCEPTIONS TO HEARING OFFICER'S REPORT AND RECOMMENDATIONS ON OBJECTIONS TO CONDUCT AFFECTING RESULTS OF THE ELECTION with the National Labor Relations Board using the Board's electronic filing system. In addition, I served additional copies of the Exceptions as follows by US Mail:

William A. Sokol Kristina Hillman Weinberg Roger Rosenfeld 1001 Marina Village Parkway, Suite 200 Alameda, CA 94501-1091

Phone: (510) 337-1001 Fax: (510) 337-1023 Cell: (510) 750-6611

wsokol@unioncounsel.net

Regional Director Overstreet 2600 North Central Avenue Suite 1400

Phoenix, AZ 85004-3099

National Labor Relations Board Honorable Lester A. Heltzer, **Executive Secretary** 1099 14th Street N.W. Washington, D.C. 20570 (E-Filed)

- [] BY ELECTRONIC MAIL (EMAIL): I attached a full, virus-free pdf version of the document to electronic correspondence (e-mail) and transmitted the document from my own e-mail address, christar@jacksonlewis.com, to the persons at the e-mail addresses above. There was no report of any error or delay in the transmission of the e-mail.
- [X]BY US Mail: I placed a true and correct copy of the document, enclosed in a sealed envelope, and caused such envelope to be delivered at the above address within 24 hours by overnight delivery service.

Executed on March 21, 2013, at Las Vegas, NV.

/s/ Paul	<u>T.</u>	<u>Trimmer</u>	

EXHIBIT 1

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

BELLAGIO, LLC,

Employer,

and

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE TECHNICIANS ARTISTS AND ALLIED CRAFTS OF THE UNITED STATES AND CANADA LOCAL 720, AFL-CIO, Case No. 28-RC-088794

Union.

BELLAGIO, LLC'S AMENDED EXCEPTIONS TO HEARING OFFICER'S REPORT AND RECOMMENDATIONS ON OBJECTIONS TO CONDUCT AFFECTING RESULTS OF THE ELECTION

Pursuant to section 102.69 of the National Labor Relations Board's Rules and Regulations, as amended, Bellagio, LLC (the "Employer") excepts to the Hearing Officer's Report and Recommendations on Objections¹ as follows:

1. To the finding that each of Bellagio's five objections be overruled because, in the Hearing Officer's opinion, the evidence is not sufficient to establish that the International Alliance of Theatrical Stage Employees and Moving Picture Technicians Artists and Allied Crafts of the United States and Canada, Local 720 AFL-CIO (the "Union"), by and through its agents and/or third parties, engaged in misconduct that warrants setting aside the results of the October 10, 2012 election (the "election."). (Report at pp. 1 and 21.) ²

Bellagio's brief in support of these exceptions is being submitted contemporaneously.

The Report has page numbers, but it does not contain line numbers. Accordingly, citations to the Hearing Officer's findings are in the following format: Report at p. --.

- 2. To the finding that Union Business Agent J.T. Gorey ("Gorey") credibly testified that he did not promise better representation to employees who voted yes because he knew that Nevada is a right to work state. (Report at p. 9.)
- 3. To the failure to credit Doug Spicka's ("Spicka") testimony that at an October 3, 2012 meeting at the Union hall, Gorey stated that: "Well, if somebody that voted yes for IATSE had some kind of a grievance, then we would get behind them 120 percent. And if we knew somebody voted no and didn't want the Union in Bellagio, then we'd give them maybe 50 percent of backing towards resolving this grievance." (Report at p. 9.)
- 4. To the failure to discredit Gorey's denial that he made the October 3, 2012 statement quoted in Exception #3. (Report at p. 9.)
- 5. To the finding that Gorey did not inform employees that if they voted against Union representation that they would not receive full and fair representation from the Union when they file grievances and that Gorey did not therefore engage in misconduct that would have reasonably tended to interfere with employees' freedom of choice. (Report at pp. 16-17.)
- 6. To the finding that Bellagio failed to establish that Robert Cohen was an agent of the Union within Section 2(13) of the Act. (Report at pp. 14-15.)
- 7. To the finding that the Union, through Cohen, did not threaten and coerce Lee Taggart in an attempt to make Taggart refrain from voting, (Report at p. 14.), and that Cohen's statements and actions towards Taggart therefore did not tend to interfere with employees' freedom of choice. (Report at p. 15.)

- 8. To the failure to discredit Gorey's testimony regarding his communications with Alfonso Torres, including his testimony that he did not ask Torres to speak with Spicka, his testimony that he had neither authorized Torres to speak on behalf of the Union in connection to the Bellagio Organizing effort, nor asked Torres to reach out to Spicka. (Report at p. 12.)
- 9. To the failure to draw an adverse inference against the Union for failing to call Torres as a witness as to the conversations he had with Spicka and Gorey, as well as the threats he made to Spicka. (Report at p. 12.)
- 10. To the finding that Bellagio failed to establish that Torres was an agent of the Union within the meaning of Section 2(13) of the Act. (Report at pp. 17-18.)
- 11. To the failure to properly consider the closeness of the election and the fact that an outcome determinative number of voters, Spicka, Taggart and Mbacke, were aware of Torres' threats of violence. (Report at pp. 18-19.)
- 12. To the finding that the Employer failed to establish that Torres was capable of carrying out his threats. (Report at p. 19.)
- 13. To the finding that the Employer failed to establish that members of the voting unit acted in fear of Torres' threats. (Report at p. 19.)
- 14. To the finding that Torres' conduct failed to create a general atmosphere of fear and reprisal rendering a free election impossible. (Report at pp. 17-19.)
- 15. To the finding that Aaron was not an agent of the Union within the meaning of Section 2(13) of the Act. (Report at p. 19.)
- 16. To the failure to properly consider the closeness of the election and the fact that an outcome determinative number of voters, Spicka and Taggart, were aware of Aaron's threat of violence. (Report at pp. 18-20.)

- 17. To the finding that the Employer failed to establish that Aaron was capable of carrying out his threat. (Report at p. 19-20.)
- 18. To the finding that the Employer failed to establish that members of the voting unit acted in fear of Aaron's threats. (Report at p. 19-20.)
- 19. To the finding that Aaron's conduct failed to create a general atmosphere of fear and reprisal rendering a free election impossible. (Report at pp. 17-20.)
- 20. To the finding that Aaron and Torres' conduct, when considered together, failed to create a general atmosphere of fear and reprisal rendering a free election impossible. (Report at pp. 17-20.)
- 21. To the failure to consider the totality of the circumstances, including the combined effect of Cohen, Torres and Aaron's misconduct, when determining whether the Employer established the existence of a general atmosphere of fear and reprisal that rendered a free election impossible. (Report at pp. 16-20.)
- 22. To the application of a third-party standard set forth in *Mastec Direct TV*, 356 NLRB No. 110 (March 7, 2011), which is a significant and unsupported departure from Board precedent, and to imposing a related requirement that the Employer establish that third parties are both capable of carrying out a threat and that members of the voting unit "acted in fear of that capability" in order to establish the existence of a general atmosphere of fear and reprisal that rendered a free election impossible. (Report at pp. 18-20.)
- 23. To the finding that Objection 1 should be overruled. (Report at p. 14, 16, 17, 19, 21.)
 - 24. To the finding that Objection 2 should be overruled. (Report at p. 17, 19, 21.)
 - 25. To the finding that Objection 3 should be overruled. (Report at p. 16, 21.)

- 26. To the finding that Objection 4 should be overruled. (Report at p. 14, 17, 19, 21.)
- 27. To the finding that Objection 5 should be overruled. (Report at p. 14, 16, 17, 19, 21.)
- 28. The results of the election cannot be certified, and the processing of the underlying petition was invalid, because the Board lacked a quorum at the times the petition was filed, the election was conducted, and the Region conducted a hearing and overruled Bellagio's objections to the elections. Under the Act, all authority is vested in the Board. Because the President's recess appointments of Members Becker, Block, Griffin and Flynn are constitutionally invalid, however, the Board lacked a quorum at all times relevant to this case. *Noel Canning v. NLRB, et al.*, Nos. 12-1115 and 12-1153, slip op. (D.C. Cir. Jan. 25, 2013); *see also New Process Steel, L.P.*, 130 S. Ct. 2635, 2636 (2010); *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009). While others may act on the Board's behalf by statute or delegation, they cannot do so when the Board itself lacks the authority to act. Accordingly, the election must be set aside, its results cannot be certified, and the underlying petition for election must be dismissed. *See id.*; *see also New Process Steel*, 130 S. Ct. at 2636.
- 29. Bellagio excepts to the Hearing Officer's application of *Mastec Direct TV*, 356 NLRB No. 110 (March 7, 2011). That decision is invalid pursuant to the D.C. Circuit's decision in *Noel Canning v. NLRB, et al.*, Nos. 12-1115 and 12-1153, slip op. (D.C. Cir. Jan. 25, 2013). See also New Process Steel, L.P., 130 S. Ct. 2635, 2636 (2010); Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB, 564 F.3d 469 (D.C. Cir. 2009). Mastec was a split decision, with Chairman Liebman and Member Becker in the majority and Member Hayes dissenting. In Noel Canning, however, the D.C. Circuit held that recess appointments to the Board are invalid under the Constitution's recess appointments clause when the underlying vacancy did not "happen"

during the Senate's recess and the President's purported appointment did not occur during that

same recess. Nos. 12-1115 and 12-1153, slip op. at 14, 40-44. Accordingly, because the

appointment of Member Becker did not satisfy these conditions, it was invalid. He could not

have participated in *Mastec*, and the Board could not have issued a decision, let alone overruled

decades of established precedent regarding whether an individual can be considered an agent of a

union and whether an election should be set aside based upon third party misconduct, in that

case. It therefore could not have been used as an authority to overrule Bellagio's objections to

the conduct of Union Business Agents J.T. Gorey, Robert Cohen, and Alfonso Torres. (Report at

9-20).

WHEREFORE, Bellagio respectfully requests the foregoing Amended Exceptions to the

Hearing Officer's Report And Recommendations On Objections To Conduct Affecting The

Results Of The Election be granted, the election be set aside, and a new election be ordered.

Dated: March 21, 2013

Respectfully submitted,

JACKSON LEWIS LLP

By:

/s/ Paul T. Trimmer

Gary C. Moss

Paul T. Trimmer

3800 Howard Hughes Parkway

Suite 600

Las Vegas, Nevada 89169

Telephone: (702) 921-2460

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Attorneys for Employer

6

CERTIFICATE OF SERVICE

Case Name: BELLAGIO, LLC, 28-RC-088794

I, Paul Trimmer, declare that I am employed with the law firm of Jackson Lewis LLP, whose address is 3800 Howard Hughes Pkwy, Suite 600, Las Vegas, NV 89169. I am over the age of eighteen (18) years and am not a party to this action. I declare under penalty of perjury under the laws of the State of Nevada that the following is true and correct.

On March 21, 2013, electronically filed the BELLAGIO, LLC'S AMENDED EXCEPTIONS TO HEARING OFFICER'S REPORT AND RECOMMENDATIONS ON OBJECTIONS TO CONDUCT AFFECTING RESULTS OF THE ELECTION with the National Labor Relations Board using the Board's electronic filing system. In addition, I served additional copies of the Exceptions as follows by US Mail:

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Regional Director Overstreet 2600 North Central Avenue **Suite 1400** Phoenix, AZ 85004-3099

National Labor Relations Board Honorable Lester A. Heltzer, **Executive Secretary** 1099 14th Street N.W. Washington, D.C. 20570 (E-Filed)

- BY ELECTRONIC MAIL (EMAIL): I attached a full, virus-free pdf version of the document to electronic correspondence (e-mail) and transmitted the document from my own e-mail address, christar@jacksonlewis.com, to the persons at the e-mail addresses above. There was no report of any error or delay in the transmission of the e-mail.
- XBY US Mail: I placed a true and correct copy of the document, enclosed in a sealed envelope, and caused such envelope to be delivered at the above address within 24 hours by overnight delivery service.

Executed on March 21, 2013, at Las Vegas, NV.

/s/ Paul	T. Trimmer	

EXHIBIT 2



Representing Management Exclusively in Workplace Law and Related Litigation ALBANY, NY

Jackson Lewis LLP 3800 Howard Hughes Parkway Suite 600 Las Vegas, Nevada 89169 Tel 702 921-2460 Fax 702 921-2461 www.jacksonlewis.com

ALBUQUERQUE, NM ATLANTA, GA AUSTIN, TX BALTIMORE, MD BIRMINGHAM, AL BOSTON, MÁ CHICAGO, IL CINCINNATI, OH CLEVELAND, OH DALLAS, TX DÉNVER, CO

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PORTSMOUTH, NH PROVIDENCE, RI RALEIGH-DURHAM, NO RICHMOND, VA SACRAMENTO, CA SAINT LOUIS, MO SAN FRANCISCO, CA SEATTLE WA STAMPORD, CT WASHINGTON DC REGION WHITE PLAINS, NY

March 21, 2013

Lester A. Heltzer **Executive Secretary** National Labor Relations Board 1099 – 14th Street, N.W. Washington, D.C. 20570

Bellagio, LLC and International Alliance of Theatrical Stage Employees and Moving Picture Technicians Artists and Allied Crafts of the United States and Canada Local 720, AFL-CIO NLRB Case No. 28-RC-088794

Dear Mr. Heltzer:

Bellagio, LLC filed exceptions and a supporting brief in the above-referenced matter on November 2, 2012. I am writing to request that the Board take notice of supplemental authorities in accordance with Etiwanda, LLC, 339 NLRB 66 (2003).1

On January 25, 2013, the D.C. Circuit Court of Appeals issued its decision in Noel Canning v. NLRB, et al., Nos. 12-1115 and 12-1153 (D.C. Cir. Jan. 25, 2013). The Court of Appeals held that the Board, as it is presently constituted and as it was constituted at all times relevant to the above-referenced petition and election, lacks a quorum. It also held that recess appointments to the Board are invalid under the Constitution's recess appointments clause unless the underlying vacancy "happen[ed]" during the Senate's recess and the President's purported appointment occurred during that same recess.

Noel Canning is dispositive. Because the Board both lacks a quorum and lacked a quorum at the time the petition was filed, the election was conducted, and the Region overruled Bellagio's objections to the elections, it did not have the authority to take action in this case. See Noel Canning, slip op. at 14, 40-44; see also New Process Steel, L.P., 130 S. Ct. 2635, 2636 (2010). Accordingly, the election cannot be certified, and the underlying petition for election must be dismissed.

¹ Bellagio is filing a motion to amend its exceptions contemporaneously with the mailing of this letter. The motion, as well as an amended version of Bellagio's exceptions, is enclosed for your convenience.



Lester A. Heltzer March 21, 2013 Page 2

For the same reasons, the Hearing Officer's application of and reliance on *Mastec Direct TV*, 356 NLRB No. 110 (March 7, 2011) was improper. *Mastec* was a split decision. Chairman Liebman and Member Becker were in the majority. However, because the appointment of Member Becker was invalid, he could not have participated, and the Board could not have issued a decision, let alone overruled decades of established precedent regarding whether an individual can be considered an agent of a union and whether an election should be set aside on the basis of third party misconduct. It therefore could not have been used as an authority to overrule Bellagio's objections.

Sincerely,

JACKSON LEWIS LLP

Paul T. Trimmer

PTT/rjc Enclosures